

## CONSTRUCTION INDUSTRY

Under California law, a contractor, licensed or unlicensed, who engages the services of unlicensed subcontractors or construction workers is, by specific statute, the employer of those unlicensed subcontractors or workers, even if the subcontractors or workers are independent contractors under the usual common law rules.

A contractor is any person who constructs, alters, repairs, adds to, subtracts from, improves, moves, wrecks, or demolishes any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or does any part thereof, including the erection of scaffolding or other structures or works or the cleaning of grounds or structures in connection therewith. The term contractor includes subcontractor and specialty contractor.

### Who Is a Statutory Employee in the Construction Industry?

Sections 621.5 and 13004.5 of the California Unemployment Insurance Code (CUIC) were written in identical language and state:

“(a) ‘Employee’ also means any individual who is an employee, pursuant to Section 2750.5 of the Labor Code, of a person who holds a valid state contractor’s license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

(b) When subdivision (a) does not apply, ‘employee’ shall also mean any individual who is an employee, pursuant to Section 2750.5 of the Labor Code, of a person who is required to obtain a valid state contractor’s license pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.”

Section 2750.5 of the Labor Code states in pertinent part:

“There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor...”

Section 2750.5 states that the following factors support an independent contractor status:

- (a) The individual directs and controls the means by which the services contracted for are accomplished.
- (b) The individual is customarily engaged in an independently established business.
- (c) The individual’s independent contractor status is bona fide and not a subterfuge to avoid employee status.

In addition to the above factors, the individual must have a valid contractor’s license to perform the work.

The bottom line is that without a valid contractor’s license a person performing services in the construction trade is an employee of the contractor who either holds a license or is required to be licensed.

The term “valid license” means the license was issued to the correct individual or entity, the license was for the type of service being provided, and the license was for the entire period of the job.

The Contractor’s State License Board (CSLB) determines who must be licensed to perform services in the construction industry within California. A contractor or a worker should contact the CSLB to determine if the services performed require a license. You should document the CSLB determination. The documentation may include the following:

- 1) The date of the contact. The name of the person making the inquiry.
- 2) The name of the CSLB representative who made the determination, if contacted by telephone.
- 3) The information provided during the contact to determine whether a contractor’s license is required, such as:
  - a) If a license is not required, why?
  - b) How do the services being performed not qualify under various license classifications (Class A, B, or C.)

**Caution:** Possession of a valid contractor’s license does not automatically make the worker an independent contractor. The worker must also be performing services under conditions and circumstances which would support an independent contractor relationship under Section 2750.5 of the Labor Code.

Wages paid to an employee as defined by Sections 621.5 and 13004.5 CUIC are subject to Unemployment Insurance (UI), State Disability Insurance (SDI), the Employment Training Tax (ETT), and California Personal Income Tax Withholding (PIT). Prior to January 1, 1991, Section 13004.5 did not exist, and an employee as defined by Section 621.5 was subject to UI, SDI, and ETT only. Wages paid to that worker prior to January 1, 1991 were subject to PIT only if the worker was a common law employee.

### Examples of Employment in the Construction Industry

- 1) A general contractor who holds a valid California contractor’s license hires an out-of-state subcontractor to perform services for which a license is required. The subcontractor has a license issued by another state but is not licensed in California. In this instance,

the subcontractor and all of his workers are statutory employees of the general contractor under Sections 621.5 and 13004.5 CUIIC because the subcontractor does not hold a valid California contractor's license.

- 2) A roofing contractor (licensed or unlicensed) hires a subcontractor who was determined to be an independent contractor under factors (a), (b), and (c) of Section 2750.5 of the Labor Code; however, that subcontractor does not hold a valid contractor's license. The subcontractor and his/her workers are statutory employees of the roofing contractor under Sections 621.5 and 13004.5 CUIIC because he/she does not hold a valid contractor's license.
- 3) A general contractor who holds a valid contractor's license hires a subcontractor, which is a partnership, to install carpets. One of the partners holds a valid contractor's license; however, the partnership is unlicensed. All workers including the partners and their employees are statutory employees of the general contractor under Sections 621.5 and 13004.5 CUIIC because the partnership does not hold a valid contractor's license. The Contractors' State License Board must have issued a separate license for the partnership in order for the license to be considered valid. This concept also applies to a corporation as the corporation must be separately licensed.
- 4) An owner of commercial or residential rental property, or a property manager acting as the owner's agent, hires unlicensed construction workers to perform construction work on his/her own buildings. Such owners are not typically required to be licensed, so the workers may not be statutory employees under Sections 621.5 and 13004.5 of the CUIIC. The common law tests would be applied to determine if they are employees under Section 621(b) of the CUIIC (see below).
- 5) A general contractor, either licensed or unlicensed, subcontracts to an individual who also has a valid contractor's license. The individual is told by the general contractor how to accomplish his/her work, has no investment in the business, is paid by the hour, and does not provide his/her own tools. The individual is not engaged in an independently established business. The general contractor controlled the time and place the work was performed and could sever the relationship at will.

The individual would not be an independent contractor simply because he or she holds a valid contractor's license. However, the individual would be an employee because he/she did not meet the (a), (b), and (c) tests set forth in Section 2750.5 of the Labor Code.

### Who Is a Common Law Employee?

Except in the case of workers performing services in the construction trades for which a license is required, the

determination as to whether a worker is an employee or an independent contractor is, in most cases, made under common law rules.

Under common law, an employer-employee relationship exists when an employer has the right to exercise control over the manner and means by which an individual performs his or her services. The right of control by the employer, whether or not exercised, is the most important factor in determining the relationship. The right to discharge a worker at will and without cause is strong evidence of the right of direction and control. The following factors will also be taken into consideration:

- 1) Whether or not the one performing the services is engaged in a separately established occupation or business.
- 2) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.
- 3) The skill required in performing the services and accomplishing the desired result.
- 4) Whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.
- 5) The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.
- 6) The method of payment, whether by the time, a piece rate, or by the job.
- 7) Whether or not the work is part of the regular business of the principal or whether the work is not within the regular business of the principal.
- 8) Whether or not the parties believe they are creating the relationship of employer and employee.
- 9) The extent of actual control exercised by the principal over the manner and means of performing the services.
- 10) Whether the principal is or is not engaged in a business enterprise or the services being performed are for the benefit or convenience of the principal as an individual.
- 11) Whether the worker can make business decisions which would enable him or her to earn a profit or incur a financial loss. Investment of the worker's time is not sufficient to show a risk of loss.

The factors enumerated above are evidence of the right to control. A determination of whether an individual is an employee will depend upon a grouping of factors that are significant in relationship to the service being performed.

Equal Opportunity Employer/Program. Auxiliary services and assistance available to persons with disabilities.
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